82-1690

No.

In the
Supreme Court of the United States
OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

J.C. LEE.
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW.

1. Has the Constitutional right to a fair trial been denied to an individual where a Trial Judge invites a Motion for Recusal and upon presentation of said Motion, recuses himself. Should he then preside over a trial when the Chief Judge of the Circuit reassigns the cause to the same Trial Judge for trial?

2. Should the United States Supreme Court resolve and clarify admitted conflict of decisions which exist between the Seventh Circuit and the Fifth and Ninth Circuits with regard to the application of the interpretation of Federal Statute 18 U.S.C. Section 1001 and 18 U.S.C. Section 287?

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STATUTES

IN THE

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, J. C. LEE, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court in affirming the trial judgment resulting from the prosecution of the Petitioner under Title 18 United States Code Section 287 and Section 1001.

A.

REFERENCE TO REPORTS OF OPINIONS:

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported in full in Appendix 1A. The Opinion was made pursuant to Rule 35 of the Rules of the United States Court of Appeals for the Seventh Circuit.

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

The decision of the Court of Appeals for the Seventh Circuit was rendered on February 14, 1983. The Petition For Rehearing was denied on March 16, 1983. The Petition for Writ of Certiorari filed in this Court was timely filed within the prescribed period. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Sec. 1254 (1).

C.

STATUTES INVOLVED

18 U.S.C. 1001
18 U.S.C. 287

D.

STATEMENT OF THE CASE

On December 16, 1976, the United States Army Corps of Engineers approved a subcontract (Government Exhibit 4) wherein Central Electric Time of Schaumberg, Illinois, was to design, manufacture, and install an elaborate fire detection system for Building 203, Chanute AFB, Rantoul, Illinois. Defendant, Joseph C. Lee, was vice-president of that company. As part of that fire detection system, he listed the Hochiki of America Model PID-B smoke detectors, which were made in Japan and distributed by Hochiki of America, as one of the many system components. (R. 319) But due to problems defendant was having with Hochiki of America, (R. 611-171.33) he attempted to purchase these same PID-B smoke detectors from another company, EWAH, (R. 635) which was started with 65 percent owned by Hochiki of Japan. (R. 346) (Defendant's Exhibit 1) Defendant received a wire suggesting PID-3B instead of PID-B, because they were exactly the same, (Defendant's Exhibit 1A) (R. 467-469), except the 3B was an advanced model with an integrated circuit improving reliability. (R. 512) Defendant incorporated the 3B component into the system he designed and assembled. There were a number of service calls received about the operation of the system, which were investigated and corrected. It was also determined that there was outside interference with the system by Army personnel. (R. 70) On or about December 12, 1978, defendant at his own expense and of his own volition, and without threat of prosecution, modified the system by replacing all the component 3b units with component B units. (R. 201-203) This was approved by

the Army, and accepted by them. (R. 168) Then the government indicted him for the supplying of the component 3B units during the time they were installed, namely November 1977 to December 1978, and his claiming payment for same.

On February 3, 1981, Defendant J.C. Lee pleaded guilty to Count 1 of the Indictment before Judge Harold Baker. Thereafter, and prior to sentencing, he filed a motion before Judge Harold Baker to vacate his plea of guilty. At the hearing on March 17, 1981, after making certain comments about the Court's feeling that the defendant was possibly trying to manipulate the judicial system (page 47 of Transcript of Motion to Withdraw Plea of Guilty), Judge Baker offered to recuse himself. On April 20, 1981, a Motion to Recuse was filed before Judge Harold Baker and was heard by him, and said motion was allowed. (Tr. Vol. 1, 13)

The cause was transferred to the Chief Judge Robert D. Morgan for re-assignment. He entered an Order on April 30, 1981 cancelling the Order of recusal of Judge Harold Baker and reassigned said cause to Judge Baker for further proceedings. (Tr. Vol. 1, 14) Judge Baker then presided over all further proceedings.

The Seventh Circuit did not decide this case solely on the record filed before that Court. Instead, on its own volition and without knowledge of the appellant, the Court made its own investigation and obtained an additional transcript that had not been previously written or had not been known to the appellant. The Court then utilized the transcript to justify its position that the Trial Judge was fair. The additional transcript contained

a report of a telephone conversation between the Trial Judge and the Chief Judge outside the presence of the parties. Most important is that the phone conversation quoted by the Seventh Circuit in its decision had no effect on the Chief Judge's decision to return the cause to the recused judge since it was made after the Chief Judge had ordered the cause reassigned to the Trial Judge. (June 17, 1982, Transcript Page 5, line 14-15) The Chief Judge reassigned the case prior to any conversation with the Trial Judge and then had a conversation apparently to discuss his action with the Trial Judge and gave him reason for his action.

E.

RAISING THE FEDERAL QUESTION

This Petition is to review an order issued by the United States Court of Appeals for the Seventh Circuit affirming a Judgment Order of the United States District for the Central District of Illinois, Danville Division.

F.

PROCEEDING IN THE FEDERAL COURT

The Trial of this proceeding took place from June 22, 1981, through July 1, 1981. The defendant was found guilty of violating 18 U.S.C. 1001 and 287. On September 3, 1981, he was sentenced to one year imprisonment on each count. The sentences to run concurrently. He appealed to the Court of Appeals for the Seventh Circuit. On February 14, 1983, the Court of Appeals affirmed the District Court on March 16, 1983. The Petition for Rehearing was denied.

G.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. As to the Conflict between Circuits.

In the current condition of the law, a contract substitution can be a criminal offense in one circuit and not a crime in another. 18 U.S.C. 1001 and 287 interdicts white collar crimes. In the short period between the denial of the Petition for Rehearing and the filing of the Petition for a Writ of Certiorari, there was insufficient time to exhaust statistics as to the number of indictments that are returned each year which involve these particular statutes. (What statistics have been compiled is unknown.) There must be numerous indictments.

We have been able to locate one set of statistics which comes from the Annual Report of the Director of the Administrative Office of the United States Courts. In this report, there is a heading entitled "False Claims and Statements" which supposedly includes other statutes as well as 18, U.S.C. 287 and 1001.

These statistics reveal as follows: From the period of June 30, 1981, to June 30, 1982, there were 948 cases commenced and 817 convictions. From the period of June 30, 1980 to June 30, 1981, there were 654 cases commenced and there were 634 convictions and sentences. Hence perhaps thousands of government contractors might get involved with these sections of Law, the interpretation of these criminal statutes are important to the business community dealing with the government. In the interpretation of these statutes, uniformity among the Circuits should be required.

In the Appendix, there is an article that is reprinted which appeared in the American Bar Journal for April, 1983. This article was written by a legal scholar, renowned law professor, and a former Justice of the Supreme Court of the State of Illinois. It is timely and appropriate to the subject matter raised in this Petition for a Writ of Certiorari. It is therefore adopted as a part of this Petition as though argued herein.

With respect to Sections 1001 and 287, the question of dispute among the Circuits is whether or not "criminal intent" is an essential element of the crime which must be proved beyond a reasonable doubt. There is also the question of whether the word "wilful" as appears in the statute 18 U.S.C. 1001 and in the indictment should be used and defined in the instructions to the jury. If it is an essential element, the jury must be instructed to that effect. *In re Winship,* 397 U.S. 358, 363-364. (1970)

If the case is tried in the Seventh Circuit, "criminal intent" does not become a necessary element to be proved beyond a reasonable doubt. It is presumed in that Circuit from the word "knowing." The word "wilful" as stated in Sec. 1001 is omitted from the jury instruction on that point of law. *United States* v. *King,* 613 F. 2d 670, 674. (7th Cir. 1980) (Application for social security benefits); *United States* v. *Weatherspoon,* 581 F. 2d 595, 601. (7th Cir. 1978) (Application to collect on false school enrollment cards.) The above cases are the basis for the position of the Seventh Circuit on this question of law. This position might be understandable with respect to the set of facts presented in those cases where the defendant in each one filled out an application which he knew at the time of preparation was false, but it should not apply to all facts.

In the Second Circuit, they do not require proof of criminal intent. *United States* v. *Huber,* 603 F. 2d 387, 398, (2d Cir. 1979). (Racketeering and inflated cost applications.)

In the Ninth Circuit in a well-reasoned opinion, the Court required proof of "criminal intent." *United States* v. *Meade,* 426 F. 2d 118, 122, (9th Cir. 1970), (Farmer Conservation Applications.) Later on they changed the requirement. *United States* v. *Milton,* 602 F. 2d 231, 233, (19 U.S.C. 287 only, not 28 U.S.C. 1001) (False applications known at the time to be false.) The word "wilfully" was used in the instruction in that case. In the case at bar, it was omitted. The Sixth Circuit does not require proof of intent. *United States* v. *Ueber,* 299 F. 2d 310, 314. (6th Circuit 1962) (Not under these statutes.)

If the case were tried in the Fifth Circuit, "specific criminal intent" is an element to be proved beyond a reasonable doubt. *United States* v. *Lange,* 528 F. 2d 1280, 1287 (5th Cir. 1976). (False Application) The Fifth Circuit also uses "guilty knowledge of a purpose on the part of the defendant to cheat" which we contend is another way of requiring the element of "criminal intent" to be proved beyond a reasonable doubt. *United States* v. *Ridglea State Bank,* 357 F. 2d 495, 500 (5th Cir. 1966) (Not under this statute.)

The case having been tried in the Seventh Circuit, the defendant was at a disadvantage. The jury was not given the opportunity to determine whether there was criminal intent to defraud or scheme against the government. They were not instructed in the words of the statute. (18 U.S.C. 1001) The word "Wilful" was omitted and not defined. In this case, the defendant ordered the

right numbered component to be used under the contract and purchased another component after he was assured it was the same unit, and subsequently without orders or pressure from the Air Force and at his own expense and at a great contract loss replaced all the units to the correct original intended unit. He was then indicted only for that period of time that the other units were installed.

In other words, it is our position that the defendant may have presented one of the components to the system, which was not the same number and thus may be considered false, and that he knew that it was a different component, which he felt and has reason to believe was the same quality, but at no time did he criminally intend to scheme against the government in that he voluntarily, without orders to do so, changed these units at his own great expense and loss. His acts were not wilful as required by the statute. There should be a requirement under these statutes that the jury be instructed that the government must prove beyond a reasonable doubt that one of the necessary elements is intent of a scheme to defraud the government, or that the act be "wilful." And the Jury should be fully instructed on that point of law.

Common sense would suggest that these statutes formulate a basis for numerous indictments and trials throughout the United States causing decisional conflicts in the various Circuits. It is respectfully requested that the Court grant the Petition for the Writ of Certiorari and rectify the discrepancies and conflicts that exist among the Circuits.

2. As to the Question of Recusal.

Once a Trial Judge recuses himself from a case should a Chief Judge have the personal discretion to transfer the cause back to the same Trial Judge for further proceedings? This question appears to be one of first impression. It is an important question which affects the rights of litigants. It is a question that this Court should consider due to the potential danger to a party's constitutional right to a fair trial. It is the contention of the defendant that if a judge feels that he should recuse himself for any reason whatsoever, and if later signs an order recusing himself from a proceeding, this should be a final act on his part. He should not be told by any other peer judge that he cannot recuse himself. A judge who recuses himself must feel that he cannot give a litigant a fair trial, or that he must have some preconceived ideas immediately affecting his judgment or rulings. He would not have granted the Motion to Recuse in the first instance if this were not so. It is a personal thing within the mind of the Judge, and only he has the answer. He should not be coerced or forced to accept a case after he has recused himself. "Interest of public justice requires trials conducted by one who is a disinterested objective participant in proceeding, even if no prejudice to defendant is apparent." *Young* v. *U.S.*, 346 F. 2d 793, 796; 120 U.S. App. D.C. 12 (1965).

In another case the Court said, "The right to a tribunal free from bias or prejudice is based not on statute governing disqualification of a judge for bias and prejudice, but on Due Process Clause." *U.S.* v. *Sciuto,* 531 F. 2d 842, 845. (7th Cir. 1976).

The Court of Appeals avoids this question of law of first impression. It justifies its abdication of responsi-

bility by ordering an unknown transcript not previously filed with the Court; and, cites an ex post facto conversation between the Chief Judge and the Trial Judge as its basis. This defendant was prejudiced by the act of the Chief Judge in his attempt to convenience the administration of his docket. (June 17, 1982, Transcript Page 5, line 14, 15) The Court of Appeals in effect approved the right of court administration to take precedence over substantive individual constitutional rights to a fair trial.

CONCLUSION

For the foregoing reasons, we urge this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that the order of that Court may be reviewed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued: October 27, 1982)

February 14, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

No. 81-2480

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

J. C. LEE,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.

No. CR 80-20034

Harold A. Baker, *Judge.*

ORDER

Appellant J.C. Lee was found by a jury to have made false statements in connection with a government supply contract and to have presented a false claim against the

* Honorable John Minor Wisdom, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, is sitting by designation.

United States, in violation of 18 U.S.C. §§ 287, 1001. On this appeal, Lee raises issues involving the fairness of his trial and the question whether "intent to deceive" is a necessary element of proof under 18 U.S.C. §§ 287 and 1001. We affirm.

J. C. Lee owned and operated Central Electric Time, Inc. In December 1976, Lee's company received a subcontract on a job for the United States Army Corps of Engineers to design and install a fire detection and alarm system for a military dormitory. Under the contract, Lee agreed to use a certain type of smoke detector listed by Underwriters Laboratories ("U.L."), and designated "Model PID-B."

Instead of supplying the PID-B, however, Lee installed a different kind of detector, labeled PID-3B. The 3B detector, according to the government, was of significantly lower quality than the detector Lee agreed to install.[1] Also, the 3B was not U.L.-listed. Nevertheless, Lee put labels on the 3B detectors indicating they were U.L.-listed and installed them in the dormitory. Thereafter, Lee presented to the Army Corps of Engineers a claim for payment for having delivered the contracted-for, U.L. approved Model PID-B detectors.

Lee was convicted of violating 18 U.S.C. §§ 287 and 1001. Section 287 covers false claims for payment, and states:

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[1] Mr. James Wantz, Managing Engineer for the Hochiki American Corp., testified on behalf of the government comparing the 3B detectors with the contracted-for PID-B detectors. For example, he testified that the PID-B had nickel-plated terminals which did not corrode, whereas the 3B had zinc-plated terminals, which had begun to corrode at the time of trial. Transcript at 385-88.

Mr. Lee testified that his cost for 500 3B detectors was $7,387, whereas his cost for 500 PID-B detectors would have been $16,460. Transcript at 720.

> Whoever makes or presents to any person or officers in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department of agency thereof, *knowing* such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 287 (emphasis supplied). Section 1001 covers false statements, in this case the misuse of labels to indicate U.L. approval, and states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States *knowingly and willfully* falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document *knowing* the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (emphasis supplied).

Lee challenges the instructions given to the jury that convicted him. He contends that an intent to defraud, deceive, or scheme is the *mens rea* required under sections 287 and 1001.[2] The district court, however, held that "[t]he requisite mental state for guilt under [these sections] . . . is that the Defendant acts *knowingly*, that he act knowing the falsities of the representations and that his conduct is *intentional or deliberate in the sense*

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[2] If "intent to deceive or defraud" is a necessary element of proving a violation of §§ 287 and 1001, failure so to instruct the jury would be error. *In re Winship*, 397 U.S. 358, 364 (1970).

that he did not act out of mistake or ignorance or other innocent reason." Tr. at 862 (emphasis supplied).[3]

Lee focuses on the phrase "false, fictitious or fraudulent" in sections 287 and 1001 in arguing that the requisite mental state is an intent to defraud. We think this focus is misplaced, in that this phrase qualities the types of *claims* or *statements* that are covered by 287 and 1001 while the *mental state* required by the definition of the offenses is clearly stated in section 287 as "*knowing* such claim to be false, fictitious or fraudulent" and in section 1001 as "*knowingly* and *willfully*" making any "false, fictitious or fraudulent statements." In light of this language, we see no basis for finding that an intent to deceive is the mental state required under 18 U.S.C. §§ 287 and 1001.

Our decision is in accord with prior case law of this circuit, *see United States* v. *Beck*, 615 F.2d 441 (7th Cir. 1980);[4] *United States* v. *Weatherspoon*, 581 F.2d 595, 601 (7th Cir. 1978), and with decisions of the Fourth and Ninth Circuits construing section 287 in light of the same argument Lee makes in the instant case. *See United States* v. *Milton*, 602 F.2d 231, 232-34 (9th Cir. 1979); *United States* v. *Meher*, 582 F.2d 843, 847-48 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). *See also United*

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[3] The jury was instructed accordingly. *See* Jury Instructions at pp. 11-12, Record No. 28.

[4] Lee quotes from *Beck* in ostensible support of his position. The language he quotes appears in a discussion of what *knowledge* an aider and abettor must have; the language does not imply that the aider must have an intent to defraud. Moreover, several paragraphs prior to the language Lee quotes, the elements required under § 1001 are listed and the *mens rea* element is stated as "knowingly and willfully." *Beck*, 615 F.2d at 452.

States v. *Blecker*, 657 F.2d 629, 634 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1016 (1982).[5]

Moreover, our interpretation of the *mens rea* required under 18 U.S.C. §§ 287 and 1001 is in accord with this circuit's interpretation of the *mens rea* requirement under the False Claims Act, 31 U.S.C. § 231, which is a civil penalty statute framed in part in language similar to section 287.[6] *United States* v. *Hughes*, 585 F.2d 284, 287-88 (7th Cir. 1978) ("The government need not establish that the defendant intended to deceive, defraud, or cheat the government."). *See also, Alsco-Harvard Fraud Litigation*, 523 F. Supp. 790, 806 (D.D.C. 1981) ("The preponderant, and better view, however, is that [31 U.S.C. § 231] only requires that the defendant knowingly present a false claim to the Government.").

2.

Lee also argues that Judge Baker, who presided over the trial, should not have done so because he had previously recused himself from the case. *See* 28 U.S.C. §§ 144, 455. This unusual circumstance came about in con-

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[5] The Fourth and Ninth Circuit cases place greater emphasis than we do on the fact that the terms "false, fictitious or fraudulent" are stated in the disjunctive. *E.g.*, *Maher*, 582 F.2d at 847. We think this fact is of secondary importance given that sections 287 and 1001 explicitly state the mens rea element in terms of the defendant's knowledge. See *United States* v. *Precision Medical Laboratories, Inc.*, 593 F.2d 434, 443 (2d Cir. 1978) ("The *scienter* requirement in [§ 287] is 'knowledge'.").

[6] The cases cited by appellant supposedly constituting "[t]he weight of opinion . . . regarding 18 U.S.C. 287," Appellant's Brief at 19, are actually cases discussing the False Claims Act, 31 U.S.C. § 231. *E.g.*, *United States* v. *Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966). Also, they conflict with this circuit's decision in *United States* v. *Hughes*, 585 F.2d 284, 287-88 (7th Cir. 1978).

nection with the defendant-appellant's decision to withdraw his guilty plea. For the sake of clarity, we shall set forth the events in detail.

On February 3, 1981, Lee pleaded guilty to Count 1 of the Indictment (false statements) pursuant to a written plea agreement with the government. Judge Baker found that the defendant understood the charge, the penalties involved, and his constitutional rights, that the plea was voluntary and that a factual foundation existed for the plea. Judge Baker then accepted the plea of guilty and found the defendant guilty as charged in Count 1 of the Indictment. Transcript of Proceedings on Plea Agreement at pp. 13-14, Record No. 11. The cause was referred to the United States Probation Office for a presentence investigation and report.

On March 17, 1981, however, Lee appeared again before Judge Baker and asked that he be allowed to withdraw his guilty plea because he did not believe he was guilty of the charges and had made a mistake in pleading guilty. Transcript of Hearing on Motion to Withdraw Guilty Plea at p. 10, Record No. 17. Lee said that when he had pleaded guilty he had not known "the difference between fraud and honest mistakes." *Id.* at 18.

Judge Baker was skeptical about the motion to vacate and had the following exchange with Lee's lawyer:

> THE COURT: Suppose I determine that Mr. Lee is manipulating the judicial system,
>
> MR. METNICK: I would disagree with you.
>
> THE COURT: I understand that, but what is there to lead me to believe that he is not; that he saw the pre-sentence report and suddenly said, "Oh, I don't like this, I'm going back and change my plea now that I have seen it."

Id. at 41-42. Judge Baker shortly thereafter stated "I do have the very strong suspicion that the court is being manipulated and I will not permit that to happen to the

substantial disadvantage of the Government." *Id.* at 46. Ultimately, however, assuming that the government would be able to try the case, Judge Baker decided he would permit the withdrawal of the guilty plea. The judge then concluded the hearing by saying,

> In view of the comments that I have made, Mr. Metnick, you and your client should discuss whether you would like to ask me to recuse myself, I would be perfectly willing to—if you wish—to recuse myself since I have expressed attitudes towards Mr. Lee's sudden change of plea as being a possible manipulation with the judicial system, and if you want me to, I will, and you can ask Judge Ackerman, and I won't be personally offended.

Id. at 47 (emphasis supplied).

Thereafter, on April 20, 1981, the defendant filed a Motion to Recuse and the motion was allowed by Judge Baker. On April 30, however, Chief Judge Morgan issued a written order reassigning Lee's case to Judge Baker. His order stated

> When, on April 28, 1981, this case was set by the undersigned for further hearing at 11 a.m. on May 8, 1981, on defendant's motion to withdraw guilty plea, the undersigned was not aware that Judge Baker had allowed that plea to be withdrawn in April 16, 1981. However, because Judge Baker is now apparently of the opinion that the guilty plea he received on February 3, 1981 should not establish defendant's guilt in accordance therewith, and that the proceedings before him on that date should be held for naught, he is in no sense disqualified to preside over a jury trial of the defendant on this indictment. *In truth, he is the best qualified judge, from the standpoint of assured fairness to the defendant, because he has specifically shown his ability to ignore those definitive proceedings of February 3, 1981; and there is no way to know, and no basis to assume, that*

another judge could do so. No basis for recusal of Judge Baker is asserted in defendant's motion, except his asserted offer to do so.

Accordingly, IT IS ORDERED that the further hearing on motion set herein on May 8, 1981 is cancelled.

IT IS FURTHER ORDERED that this case is reassigned to the Honorable Harold A. Baker for all necessary further proceedings.

Order Assigning Case, Record No. 14 (emphasis supplied).

On June 10, 1981, Lee filed before Judge Baker a Renewed Motion to Recuse, to which the government filed a response on June 16. Record Nos. 19, 20. On June 17, 1981, Judge Baker had a hearing on the renewed recusal motion.[7]

At the June 17 hearing, Judge Baker shed some light on what had happened between himself and Chief Judge Morgan. Prior to reassigning the case to him, Chief Judge Morgan had spoken with Judge Baker. Judge Baker assured the Chief Judge that he had no personal bias or prejudice against Mr. Lee and that he had suggested recusal because he thought the lawyers might prefer it. Judge Baker stated, "If they were uncomfortable I would let them go elsewhere." The Chief Judge responded, "Well, we can't be shipping the cases around the district that way." "I will send it back unless you have feelings against Mr. Lee." Judge Baker replied, "I have no feelings against Mr. Lee. Send it back." Transcript of June 17, 1981 Hearing at 5.

In light of these facts, we cannot say that Judge Baker should have disqualified himself from conducting the defendant's jury trial. The judge's brief comment regard-

[7] The transcript of this hearing was not originally included in the appellate record. We obtained a transcript from the District Court Clerk.

ing possible manipulation of the judicial system was clearly based on what he had observed in the case before him. Even if that demonstrated bias, which we do not think it does in light of all the facts, it would not be the kind of bias requiring disqualification. As many courts, including the Supreme Court, have noted, "[t]he alleged bias or prejudice to be disqualifying must stem from and extrajudicial source and result in an opinion on the merits on *some basis other than what the judge learned from his participation in the case.*" *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966) (emphasis supplied). *See United States* v. *English*, 501 F.2d 1254, 1263 (7th Cir. 1974) (quoting *Grinnell Corp.*), *cert. denied sub nom. Hubbard* v. *United States*, 419 U.S. 1114 (1975). In any event, the facts reveal a trial judge careful to preserve the defendant's rights. Judge Baker himself raised the idea of recusal and later personally approved the reassignment of the case to him. He also explained to the parties why he had accepted the reassignment. We see no well-founded evidence of actual or even apparent prejudice such that Judge Baker's impartiality might reasonably be questioned.

3.

Lee also challenges two of the district court's evidentiary rulings. The court disallowed some of the defendant's evidence on alarm system design defects and admitted some of the government's evidence on alarm system malfunctioning. The court allowed each side to introduce evidence on these points, *e.g.*, Record at 567-69, but limited the parties to what the court thought relevant. Its rationale is explained in the Record, *see* Record at 48-40, 578-81, 583-87, and we do not find that there was an abuse of discretion. *Ellis* v. *City of Chicago*, 667 F.2d 606, 611 (7th Cir. 1981) ("decisions regarding the admission and exclusion of evidence are peculiarly within the competence of the district court and will not be reversed on appeal unless they constitute a clear abuse of discretion.").

4.

Finally, Lee complains about statements made by the prosecutor during his closing argument. For example, the prosecutor said of defendant's expert that "[h]e is a profit person. He gives his opinion for profit. He is for sale. . . . There is another name that would characterize the professor that also begin with a "[P]". It is a person who uses his ability and his talents for unworthy purpose, usually for profit or money.'"[8] Record at 902. Later, the prosecutor said regarding the defendant, "[he] is not one of your family, you don't owe him anything. The only thing you owe anybody is to this Court to give this Defendant a fair and impartial trial which he has had." Record at 925.[9]

As for the former remark, Lee contends that the jury heard a "T" and interpreted this to mean that the expert was a traitor. As for the latter statement, Lee argues that the phrase "[he] is not one of your family, you don't owe him anything," was a "coded message" that prejudiced the jury against "the yellow, Asian defendant." Appellant's Brief at 12. Though we cannot know with total certitude what the jury inferred from the prosecutor's statements, the defendant's interpretations seem strained. We do not find that the challenged comments, constitute "plain error" "affecting substantial rights," the kind of error that requires reversal when, as here, no

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[8] It is a matter of some dispute whether the bracketed letter should have been a "T" or a "P." The prosecutor stated at oral argument that he said "P," meaning to imply the word "prostitute." The court reporter typed the letter T.

[9] Lee also complains generally that the prosecutor talked about "money" after having been instructed by the judge not to do so. We have examined the instruction and comments complained of and find that defendant's complaints are not well-founded. *Compare* Record at 878-79 (instructions) with *id.* at 893, 896 (comments).

objection was made by defendant's trial counsel. Fed. R. Crim. P. 52(b). *United States* v. *Spears*, 671 F.2d 991, 992 (7th Cir. 1982). "Reversal for 'plain error' requires error both obvious and substantial,' or 'serious and manifest errors' . . . ." *United States* v. *Jackson*, 542 F.2d 403, 409 (7th Cir. 1976) (quoting *United States* v. *Greene*, 497 F.2d 1068, 1077 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975)). We do believe, however, that prosecutors should choose their remarks more carefully, especially when they risk being misunderstood on a matter as sensitive as a defendant's race or national origin.

AFFIRMED.

REDUCING CIRCUIT CONFLICTS

THERE HAS BEEN A BREAKDOWN IN THE UNIFORMITY OF FEDERAL LAW. BY RULE AND DECISION THE SUPREME COURT COULD INCREASE CERTAINTY AND REDUCE DISCORDANT RULINGS BY THE CIRCUIT COURTS.

By Walter V. Schaefer

At the 1982 annual meeting of the American Bar Association, three justices of the Supreme Court of the United States addressed various aspects of the "litigation explosion" as it bears on federal law and the federal courts.

Justice Powell concentrated on certain phases of federal jurisdiction that might be eliminated—notably, certain aspects of federal postconviction review in criminal cases, and those civil cases in which federal jurisdiction is based on diversity of citizenship.

Justice Stevens favored a modified form of the proposal made by the Freund Committee some years ago—that a new court be created, composed of courts of appeals judges, which would screen cases on the Supreme Court's docket and select those the Court would decide on the merits. He also repeated his view that conflicting interpretations of federal law are not always evil and that "experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process."

Justice White reviewed the history of the federal courts of appeals from their creation in 1891 through the increase in the Supreme Court's discretionary jurisdiction in 1925 to the present. He favored the solution proposed by the Hruska Commission—the creation of a National Court of Appeals to which the Supreme Court might refer the overload of deserving cases that the Supreme Court is unable to take on. The decisions of the National

Court of Appeals would be subject to review and certiorari, but as Justice White stated, "that is no more than what would be necessary to ensure that the federal law is not being enforced in substantially different ways in different parts of the country." He also referred to "another interesting suggestion to minimize the occurrence of conflicting decisions among the courts of appeals. That is to require a court of appeals to go *en banc* before differing with another court of appeals and to make the first *en banc* decision the nationwide rule. I have even heard it argued that this would not require legislation and could be done by rule."

These statements encourage me to write about the breakdown in the uniformity of federal law throughout the United States. The imperative need for a uniform body of national law underlies the judicial article of the Constitution. As Hamilton pointed out in The Federalist, No. 80, "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdcition over the same causes arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." And in the landmark case of *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816), Justice Story spoke of the "importance, and even necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution."

"Judges of equal learning and integrity, in different states," he continued, "might differently interpret the statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might, perhaps, never receive the same construction, obligation or efficiency in any two States. The possible mischief that might attend such a state of things would be truly deplorable."

Now the threat to uniformity of national law comes not from the state courts but from the federal courts of appeals. The creation in 1982 of the new Court of Appeals for the Federal Circuit should eliminate one of the prolific sources of conflict. All patent cases will be reviewable in that court and the unseemly, indeed, the absurd spectacle of courts of appeals opinions in which the identical patent was held valid in one circuit but invalid in others will be eliminated for the future. Forum shopping, a staple stock in trade of the patent bar, will be largely eliminated.

The possibility of conflicting rulings in cases involving federal laws, however, probably has been enhanced by the division of the former Fifth Circuit into the new Fifth and 11th circuits. The proliferation of courts of appeals means inevitably, in the absence of remedial action, a proliferation of conflicts.

The spurious "law of the circuit"

The deliberate disregard of the decisions of co-ordinate United States courts of appeals has become so common that it has achieved a dubious respectability under the euphemistic phrase "the law of the circuit." That phrase, I suppose, derives from the phrase "laws of the several states" in Section 34 of the Judiciary Act of 1789, which provided that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States." I have not pursued the genealogy of the phrase, because whatever it is, the legitimacy of its present usage is highly suspect. There is no element of sovereignty in a federal judicial circuit.

I have never seen an answer to the searching questions raised by the late Judge Harold Leventhal of the Court of Appeals for the District of Columbia Circuit: "Is there a principled justification for a system where an applicant receives H.E.W. reconsideration depending on his or her residence? Or where the scope of ability to contest a search as unconstitutional depends on the state

and circuit of litigation? Or where taxability of a corporation's transfer will vary among stockholders, depending on where the stockholder lives and litigates?"

Justification for contradictory interpretations of national law from one circuit to another is sometimes sought in Justice Frankfurter's aphorism: "Wise adjudication has its own time for ripening." Whenever I encounter that statement, with its *ex cathedra* intimations, I think of Justice Holmes's observation: "It is one of the misfortunes of the law that ideas become encysted in phrases, and thereafter for a long time cease to provoke further thought." Frankfurter's metaphor is not objectionable if it means that the wisdom of a legal rule can best be appraised after it has been observed in operation. But it is unsupported if, as is sometimes the case, it is used to justify indifference on the part of the Supreme Court to discordant interpretations of the federal Constitution, statutes, or regulations while it awaits returns from additional courts of appeals.

"Percolation" and "experiment"

It has been said, too, that conflicting views are useful in "provoking" review of the issue by the Supreme Court. "Percolation" or "simmering" among the various circuits is said to be beneficial to the ultimate product delivered by the Supreme Court if and when it takes a case involving the question.

There is no empirical evidence, so far as I have been able to ascertain, to support the thesis that a better or more lasting judicial product comes from the Supreme Court after citizens in some parts of the country have been subjected to different legal rules than those that are applied to citizens who live or conduct business in other parts. To the contrary, Judge Henry Friendly said: "If a case involves questions of federal law of such importance as to be reviewed by the Supreme Court, the views of the courts of appeals count, and should count, for little. . . . Indeed, I think the Court should

make more use of its power to grant certiorari before decision in the courts of appeals and thereby shorten the unduly long period required for the determination of issues that may affect large numbers of cases in the lower courts."

Robert Stern points out that the "percolation" process may and often does take years, and then he continues wryly: "The interest of a substantial body of the public in much more swift authoritative decision-making on issues of public importance would often seem of greater weight."

If the Supreme Court truly feels a need for additional views, resources other than busy circuit judges are available. Amicus briefs would be supplied gladly by law teachers and the practicing bar.

Different interpretations of federal law have been likened to "field experiments" with the Supreme Court appraising the results before reaching its own conclusion. The notion of the Supreme Court's monitoring the results of experiments in more than 100 conflicting interpretations each year strains credulity. The Court's opinions do not suggest this activity, and nowhere does the Constitution give the Supreme Court the authority to experiment with the legal rights of citizens. The common denominator of these rationalizations is a kind of institutional myopia that fouses on abstractions and ignores the impact of the law on real people.

What regional differences?

It also has been suggested that conflicts of interpretation of federal law may be justified by regional differences. It is asked, for example, whether it is necessary that the law of the Ninth Circuit be identical with that of the Second and whether regional differences do not justify some intercircuit conflicts. As a practical matter, I have never seen a spelling out of any specific regional interests that have been or might be advanced by conflicting applications of federal law from one circuit to another. And as a matter of political philosophy, a deci-

sion to regionalize national law should be made by elected officials and not by an *ad hoc* panel of appointed judges, randomly selected.

In none of the instances of circuit conflict that I know of has there been any intimation of a congressional purpose that a statute or regulation should bear differently on citizens, depending on the determination of the judges of a court of appeals. The soundness of a justification based on regionalism can be tested by considering whether Congress itself could make the same discriminations between citizens in the various circuits.

The boundary lines of the federal circuits remain basically as they were fixed in 1891 when the courts of appeals as we know them came into existence. They followed the earlier lines drawn for the circuit-riding justices of the Supreme Court. In 1929 the Tenth Circuit was formed from states formerly part of the Eighth Circuit, and in 1981 Congress carved a new Fifth Circuit and a new 11th Circuit from the former Fifth.

A law review note a few years ago suggested that intercircuit conflict could be cured if Congress would "legislate the changes necessary to formalize the courts of appeals as panels of a National Court of Appeals." That change is unnecessary and undesirable. The congressional language that created the courts of appeals is the same that created the United States district courts: "There shall be in each circuit a court of appeals"; "There shall be in each judicial district a district court." That language has never been held to bar a court of appeals from imposing rules governing *stare decisis* on district courts. The suggestion also implies that Congress, if it wished to do so, could authorize the fragmentation of federal law in accordance with the views of judges of the several courts of appeals.

When Congress created the first courts of appeals in 1891 and when it later altered their boundaries and created new ones, it did not intend to establish indepen-

dent sovereign units. If Congress had intended to do so, it could not have achieved that result constitutionally.

Intracircuit conflicts ended

It is now, I think, the universal rule that one three-judge panel of a court of appeals cannot overrule the decision of another three-judge panel. If the first decision is to be overruled, it must be done by the court of appeals sitting *en banc*. This result has been accomplished in part by the influence of Rule 35 of the Federal Rules of Appellate Procedure and to an even greater extent by the flat rulings of the various courts of appeals.

The internal operating procedures of the Third Circuit, for example, provide: "It is the tradition of this court that the internal stability of its panel decisions be preserved. To avoid conflicts in panel decisions, no subsequent panel may overrule a published opinion of a previous panel. Court *en banc* consideration is required to overrule a previous decision of the court." And the Fifth Circuit, in a decision that cited earlier opinions to the same effect, stated: "Prior panel decisions of courts of appeals may not be disturbed except upon reconsideration *en banc*."

If all of the United States courts of appeals had consistently applied the view expressed by Judge Lay in *Aldens, Inc.* v. *Miller*, 610 F. 2d 538 (8th Cir. 1979), the creation of new federal appellate courts might have been avoided. He stated:

"As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system."

But the courts of appeals generally pursued a different course. The "further splintering and formation of otherwise unnecessary additional tiers in the framework of our national court system" foreseen by Judge Lay already has occurred, with the division of the old Fifth Circuit and with the creation of the new Court of Appeals for the Federal Circuit. Proposals are pending in Congress for further splintering. I hope they can be avoided, and I think they can.

There will always be a minimal residue of conflicts because of the coincidental filing of contradictory opinions and unintentional contradictions. Their volume will not be serious. What is serious is the case of the deliberate consideration and rejection of the opinion — even the *en banc* opinion — of one court of appeals by another. Those deliberate conflicts can be eliminated or reduced to manageable proportions without the necessity for more courts.

Intercircuit conflict can be ended by the same method and the same techniques that successfully solved the problem of conflicts within a single circuit. The Supreme Court has openly exercised supervisory power over the administration of justice in the federal courts since *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and it existed and was exercised long before that.

By rule and decision the Supreme Court could require procedures that would sharply reduce the conflicts and increase the uniformity of national law. A Supreme Court rule could provide that the first panel decision of a court of appeals would establish the proposition for all of the courts of appeals, just as it now does for all subsequent three-judge panels within the circuit and for all of the district courts within the circuit. That decision would remain controlling until it is overruled *en banc* by a court of appeals, either that or another circuit. That *en banc* decision would control until overruled by the Supreme Court.

The question immediately arises: What about the court of appeals judges of a different circuit who conscientiously believe that the governing decision is erroneous? Their situation is no different, I submit, than that of the district judge who is obligated to comply with a panel decision of his circuit regardless of his view as to its legal quality. There is nothing new about the concept of a nationally binding precedent. All judges throughout the nation are obligated to follow a decision of the Supreme Court of the United States — even a five-to-four decision they sincerely believe to have been wrongly decided.

A court of appeals judge who disagreed strongly with the governing decision would remain free to express his disagreement and the grounds for it. All of us are familiar with opinions that adhere to precedent while expressing the contrary views of the author of the opinion, and some of us have written them. To the extent that there may be value in the notion of "percolation" among the courts of appeals, that benefit can be gained without fragmenting the national law. And to the extent that discordant courts of appeals opinions may be thought to have value by way of "provoking" a ruling by the Supreme Court, that value too can be retained and perhaps enhanced by allowing a court of appeals to certify, on its own motion, its own decision to the Supreme Court. Review by that Court should not be compulsory, but I have no doubt that a case certified by a court of appeals would receive respectful attention.

The importance of a uniform body of national law is no less today than it was in Hamilton's day. Certainty can be increased and discordant interpretation can be reduced to a minimum by the exercise of existing judicial authority.

Journal

(*A former professor of law at Northwestern University Law School and justice of the Supreme Court of Illinois, Walter V. Schaefer now practices law in Chicago. This article is based on an address delivered in October, 1982.*)

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE DIVISION

Docket No. CR 80-20034

UNITED STATES OF AMERICA vs.
J. C. LEE
Defendant

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date

SEPTEMBER 3 1981

[ ] Without Counsel

[X] With Counsel REINO LANTO, Retained

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea,

[ ] NOLO CONTENDERE.

[X] NOT GUILTY 12/2/80

There being a verdict of

[ ] NOT GUILTY. Defendant is discharged.

[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of making fraudulent and false statements re product furnished U.S. Army Corps of Eng & USAF, as charged in count 1 of the Indictment in violation of T. 18, USC §1001 and Making a false claim and fraudulent claim upon the U.S., as charged in Count 2 of the Indictment in violation of T. 18, USC §287.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE YEAR (1) as to Count 1.

IT IS FURTHER ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE YEAR (1) as to Count 2.

IT IS FURTHER ORDERED that the sentences on Counts 1 and 2 run concurrently. Execution of sentence stayed pending appeal. Bond to continue.

The court orders commitment to the custody of the Attorney General and recommends,

/s/ Harold Baker
U. S. District Judge

September 3, 1981